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Supreme Court of the United States

October Term, 1970

No. ~~1129~~ 70-58

OLIVER T. FEIN,

Petitioner,

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, Yonkers, New York; SELECTIVE SERVICE APPEAL BOARD FOR THE SOUTHERN DISTRICT OF NEW YORK; COL. JOHN W. BROKAW, Acting Director, New York Selective Service System; NEW YORK STATE SELECTIVE SERVICE DIRECTOR; NATIONAL SELECTIVE SERVICE APPEAL BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court is unreported and appears at A. 90-96.[1] The majority opinion of the Court of Appeals is reported at 430 F. 2d 376, and appears at A. 97-103, and the dissenting opinion appears at A. 104.

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[1] "A" references are to the Single Appendix filed with this Brief.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1970. On October 16, 1970, Mr. Justice Harlan extended the time in which to file the Petition for a Writ of Certiorari to and including December 19, 1970, on which date it was filed. Certiorari was granted on March 8, 1971. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

Constitutional, Statutory and Regulatory Provisions Involved

The pertinent provisions of Article III, § 2 of the Constitution and the Fifth Amendment thereto; the Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3); 28 U.S.C. § 1331; and 32 CFR §§ 1623.2, 1626.1, 1626.11, 1626.12, 1626.24(b), 1627.1, 1627.3(a) are set forth *infra*, pp. 1a-4a.

Questions Presented

1. Where, after lengthy correspondence, two personal interviews and extensive personal testimonials, a Selective Service registrant is granted conscientious objector status by his Local Board, does it violate procedural due process for the State Director to appeal and the State Appeal Board to revoke such status summarily, without

(a) notice to the registrant by either the State Director or the Appeal Board of the issues and underlying factual questions involved on the appeal;

(b) disclosure to the registrant of statements by the State Director which were submitted to the Appeal Board;

(c) limitation on the Appeal Board to confine its considerations to the record, but rather permitting it to go beyond the record and consider, without notifying the registrant, "general information regarding economic, industrial and social conditions in the community";

(d) opportunity for the registrant to present to the Appeal Board a statement in support of his conscientious objector classification and in rebuttal to any submission by the State Director and any information which the Appeal Board deems adverse; and

(e) statement of reasons by the Appeal Board for revoking the registrant's conscientious objector status?

2. Does the statutory delegation of power to the President in 50 U.S.C. App. § 460(b)(3) to prescribe "rules and regulations" for appeals from local board classifications authorize revocation of a registrant's conscientious objector status by the summary process described in Question 1?

3. Is a State Director authorized by statute to prosecute a plenary appeal from a Local Board's determination granting a registrant conscientious objector status?

4. Where a registrant's conscientious objector status has been revoked under fundamentally unfair and statutorily unauthorized procedures, and where all administrative appellate remedies have been exhausted and the registrant has been ordered to report for induction, is the registrant nevertheless barred from seeking redress in a district court prior to submitting to or refusing induction by § 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3) or by the jurisdictional amount requirement contained in 28 U.S.C. § 1331(a)?

Statement of the Case

Petitioner is a doctor of medicine, currently practicing in the field of community health in New York City. He is a registrant of Local Board 7, Yonkers, New York, which had classified him as a student (II-S) for the duration of his academic career. Subsequently, petitioner was granted an occupational deferment (II-A) for performance of work in the national interest on the basis of his internship in medicine and pediatrics at Cleveland Metropolitan General Hospital.

In September, 1967, while petitioner was so deferred, he notified his Local Board that he was a conscientious objector (A. 27). Thereafter, he filed a formal application for conscientious objector status declaring his opposition to participation in war in any form by reason of his religious training and belief (A. 29).

In support of his application, petitioner recited early and rigorous religious training by his parents, in the Lutheran Church and through a Quaker education (A. 38-39, 42-43). He also identified as sources of his religious beliefs his experience with non-violent demonstrations in the Civil Rights Movement, his medical training and his activity while an intern establishing a ghetto community health project in 1966, at the request of the Students for a Democratic Society (A. 40, 43-45).

Based on his formal and informal religious training and experiences, petitioner concluded, as he stated in his application for conscientious objector status, that "religion sets forth a guideline for human conduct which determines how human beings should relate to each other . . . . It is in the codes for human relations that all religions find their common ground. The substance of my beliefs stems from this foundation of all religions" (A. 38). In a subsequent letter to the Local Board, petitioner said: "My religious

training has nurtured within me a set of beliefs about the quality of 'goodness' in all men, which imposes certain duties on my conduct. Thus, my beliefs have directed my life: where I live, with whom I work, the type of work I do. It is this set of beliefs that leads me to be conscientiously opposed to war, and willing to accept the consequences, alternative service or jail" (A. 40). See also A. 13-14.

Upon receipt of petitioner's application, the Local Board carefully canvassed the sincerity of petitioner's beliefs both by examining reference letters it had obtained from a Lutheran clergyman, the Dean of Western Reserve Medical School and numerous medical colleagues of petitioner (A. 47-52) and by assessing petitioner's demeanor and credibility at two personal interviews.

After the first such interview on November 15, 1967, the Local Board, consistent with 32 CFR 1623.2, which requires that a registrant be placed in the lowest classification to which he is entitled, retained petitioner in classification II-A stating that he did not qualify as a conscientious objector "at that time" (A. 58).

Following reclassification to I-A and a second detailed personal interview, the Local Board, on May 27, 1968, found that petitioner met the standards of sincerity and opposition to participation in war in any form based upon his religious training and belief, and classified him as a conscientious objector (1-O) (A. 61-62).

On June 4, 1968, petitioner was advised by letter that the State Director intended to appeal the Local Board's determination because, in his "opinion", petitioner "would not qualify for a 1-O classification as a conscientious objector" (A. 63). No further explanation was given, and petitioner was informed merely that he would be advised of the Appeal Board's decision (A. 63-64).

Petitioner immediately wrote and requested from both the Local and Appeal Boards a "statement indicating the

basis for the State Director's appeal" and "an opportunity to reply to such statement" (A. 66).

Petitioner never received a pertinent response to these requests. The only word of any kind petitioner received from the Appeal Board was a form styled Individual Appeal Record dated June 20, 1968, which stated that by a vote of 4-0 he had been reclassified 1-A. No reasons were given on that form or otherwise for the Appeal Board's action.

On July 31, 1968, petitioner was ordered to report for induction.[2]

On February 10, 1969, petitioner filed suit in the Southern District of New York, seeking a judgment declaring the appeal procedure followed by the State Director and State Appeal Board to be unauthorized by statute and in violation of constitutional standards of procedural due process and seeking an order enjoining his induction and restoring him to conscientious objector status.

The District Court sustained respondent's motion to dismiss on the grounds that under § 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. § 460(b)(3), (hereinafter referred to as "§ 10(b)(3) of the Act") the court lacked jurisdiction to hear petitioner's claims (A. 90-96).

On July 23, 1970, the Court of Appeals for the Second Circuit affirmed. The majority sustained the district court's holding based on § 10(b)(3) (A. 97). Circuit Judge

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[2] This order was subsequently postponed and then cancelled pending an appeal to the Presidential Appeal Board, which, by order dated November 26, 1968, affirmed the State Appeal Board's action, also without stating any reasons. During the pendency of this appeal, petitioner twice wrote to the State Director requesting the basis for his decision to appeal the 1-O classification to enable petitioner to submit a relevant statement to the Presidential Appeal Board (A. 82, 83). After the second letter, the State Director responded by stating simply that his decision to appeal "was based upon the information contained in your [petitioner's] selective service file" (A. 84).

Hays concurred, finding in addition that petitioner's failure to establish the jurisdictional amount under 28 U.S.C. § 1331(a) deprived the court of subject matter jurisdiction.

Chief Judge Lumbard dissented. He concluded that in light of this Court's recent decisions construing § 10(b)(3), the district court had jurisdiction to determine whether petitioner's conscientious objector status was revoked by constitutionally invalid or statutorily unauthorized procedures (A. 33). While expressing doubt that a jurisdictional amount requirement could constitutionally be imposed in the case of a "poor man who stands to lose nothing but his most precious personal liberties," Judge Lumbard concluded that there was no need to decide the question because respondents had not, and in all likelihood could not, maintain the heavy burden of disproving petitioner's jurisdictional amount allegation (A. 113). On the merits, Judge Lumbard found that petitioner's reclassification was accomplished by a fundamentally unfair procedure and that, in addition, there was a strong possibility the Appeal Board had indulged in an unwarranted political assumption, based on information outside of the record, that petitioner's participation as a doctor in a clinic sponsored by the Students for a Democratic Society disqualified him from status as a conscientious objector (A. 118).

Summary of Argument

A. The Selective Service appellate regulatory scheme particularly as it affects conscientious objectors whose classification has been acknowledged by local boards is riven with violations of due process. Virtually every protection invested by the federal system over three decades of experience with administrative agency review is absent.

More particularly, there is no provision made for a recitation of reasons or applicable issues by the State Direc-

tor; no right to submit a meaningful, indeed any, response to the Appeal Board; no right to a statement of criteria utilized by the Appeal Board and no right to specific findings made by the Appeal Board. In addition the Appeal Board is permitted to take cognizance of information outside the record without notification to the registrant. The unbridled summary review power with no procedural protection for petitioner makes the review procedures followed here fundamentally lawless.

B. The summary appellate procedures are nowhere authorized by statute in other than general terms. This general delegation of power to prescribe rules and regulations is insufficient to justify sustaining such procedures, particularly in a circumstance in which there is a strong Congressional policy to afford meticulous procedural protections to conscientious objectors. The failure to provide full administrative review so rends the fabric of Selective Service operation in general as to violate fundamental fairness.

In addition, there is no specific statutory authority permitting an appeal by the State Director when the Local Board has determined that, after assessing the facts, a registrant is a conscientious objector. Pursuant to statute, the Local Board is the linch-pin of the Selective Service scheme. The concept of classification by members of one's local community is destroyed if an appeal in this case is permitted.

C. Revocation of petitioner's conscientious objector status by fundamentally unfair and statutorily unauthorized procedures constitutes blatantly lawless conduct which § 10(b)(3) does not insulate from pre-induction judicial review. The conduct of the Selective Service System following a finding by the Local Board that petitioner was a conscientious objector conflicts with the statutory requirement that conscientious objectors shall not be subject to training and service. Additionally pre-induction review is mandated in this case because it both falls within the ex-

ceptions recited in *Oestereich* and *Breen* and would pose a litigant with the alternative of no judicial review by a competent forum for exercising religious beliefs prior to the imposition of punishment.

Finally the purpose of § 10(b)(3) is enhanced where because there is no possibility of litigious interruption of the operations of the Selective Service System since the attack by petitioner is limited to legal issues rather than factual questions relating to classification and processing.

D. The $10,000 jurisdictional amount requirement cannot prevent assumption of jurisdiction where fundamental rights are at issue. To fail to find jurisdiction where such rights are present is to attempt to place a monetary amount on rights of infinite value and concern.

POINT I

The State Director's appeal and the State Appeal Board's revocation of petitioner's conscientious objector status, without any notice, opportunity to be heard and statement of reasons, violated petitioner's right to procedural due process.

Petitioner's Local Board granted him conscientious objector status following a thorough and careful review of the evidence in his Selective Service file and two extensive personal interviews at which his sincerity and beliefs were assessed by close observation of his demeanor and credibility.[8] Immediately thereafter, without giving peti-

[8] The personal interview by the Local Board is the most exacting and usually the most decisive test of a registrant's sincerity, because a claim of conscientious objector status will be lost if the Board concludes that a registrant's "demeanor appeared shifty or evasive or that his appearance was one of unreliability." *Witmer* v. *United States*, 348 U.S. 375, 382. The Local Board's decision in this regard is unreviewable, since the Appeal Board has no similar opportunity, under present procedures, to personally examine the registrant. See *United States* v. *Abbott*, 425 F. 2d 910, 913 (8th Cir. 1970).

tioner any reasons, the State Director appealed the local board's determination.

There followed a process of review by the State Appeal Board notable only for the summary manner in which it was conducted. Both the State Director and the Appeal Board ignored petitioner's requests for a statement indicating the basis for the appeal and an opportunity to respond to such statement. The Appeal Board did not solicit any information from petitioner as to any issue or factual question presented by the appeal, despite the fact that as to matters other than demeanor and credibility, the Board's review was *de novo*.[4] There is also a strong indication that the Appeal Board considered information extrinsic to the record, of which petitioner was not given notice and consequently was unable to rebut.[5] Little more than two weeks after the appeal was filed, the Appeal Board revoked petitioner's conscientious objector status without stating any reasons for its decision.

For any registrant, revocation by an Appeal Board of a statutory exemption or deferment is a matter of the

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[4] See *McKart* v. *United States*, 395 U.S. 185, 198 n. 16; *McGee* v. *United States*, — U.S. —, 39 U.S. Law Week 4571, 4574; *United States* v. *Abbott*, *supra*, at 913 and n. 4.

[5] The Board might have abused its authority in taking administrative notice of "general information concerning economic, industrial and social conditions", under 32 CFR § 1626.24(b)(2), by drawing adverse inferences from petitioner's affiliation with a ghetto health clinic in Cleveland sponsored by the Students for a Democratic Society (A. 118).

In addition, petitioner has repeatedly asserted that the State Director's appeal was accompanied by either an oral or written statement to the Appeal Board specifying allegedly adverse evidence, or at least directing the Board's attention to what he considered to be the defects in the Local Board's determination. It has been the practice of State Directors in taking appeals from Local Board determinations favorable to registrants to submit such statements to the Appeal Boards. See *United States* v. *Cummins*, 425 F. 2d 646 (8th Cir. 1970); *Wiener* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969); *Nevarez Bengoechea* v. *Micheli*, 295 F. Supp. 257 (D.P.R. 1969). Respondents have neither confirmed nor denied the existence of such a statement in this case.

greatest personal consequence. Certainly, if what constitutes "procedural due process" in administrative proceedings is a function of the extent to which an individual may "be condemned to suffer grievous loss", *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263; *In re Gault*, 387 U.S. 1, 67 (Mr. Justice Harlan concurring); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (Mr. Justice Frankfurter concurring), then petitioner and other registrants—as this Court has held—are entitled to scrupulous adherence by the Selective Service System to those fundamental safeguards, without which no administrative determination of such import can be presumed fair and reliable.[6]

As a bare minimum petitioner was entitled to be (i) notified of the issues and factual questions raised by the State's Director's appeal, (ii) afforded an opportunity to be heard in response by submitting a written statement to the Appeal Board and (iii) given a statement of reasons for the Board's adverse decision. The Appeal Board's failure to adhere to these basic requirements of due process was in blatant disregard of the clear and consistent rulings of this Court over the last several decades.

1. If a registrant is to be treated with at least rudimentary fairness, then he must be given an opportunity

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[6] See *Gonzales* v. *United States*, 348 U.S. 407, 412-413; *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, 241-242 (Mr. Justice Harlan concurring). In *Olvera* v. *United States*, 223 F. 2d 880, 882 (5th Cir. 1955) (cited with approval in *Mulloy* v. *United States*, 398 U.S. 410, 416 n. 5) the court stressed the point "that when every requirement of due process has been observed by the board, its fact decisions, unless wholly unsupported, are not subject to review . . . [but] that a failure to follow [such procedural requirements with] strictness and fidelity will invalidate the order of the board. . . ." Similarly, *United States* v. *Freeman*, 388 F. 2d 246, 248 (7th Cir. 1967) held that "the procedural framework of the draft classification process and the narrowly limited judicial review available to draft registrants make adherence to procedural safeguards crucial to the maintenance of basic fairness." Cf. *Ohio Bell Tel. Co.* v. *Pub. Util. Comm'n.*, 301 U.S. 292, 304-305.

to be heard by the Appeal Board before it makes a final decision revoking his conscientious objector status, reclassifying him 1-A, and thus rendering him susceptible to induction. *Gonzales* v. *United Staes, supra*; Cf. *Goldberg* v. *Kelly, supra,* at 267; *Wisconsin* v. *Constantineau,* — U.S. —, 39 U.S.L. Week 4128, 4129.

An opportunity to be heard is the "only means", said the Court in *Gonzales* v. *United States, supra,* at 414, "of insuring that [the Appeal] Board will have all the relevant data." This right is of even greater importance to the registrant because it represents his only chance of meeting the issues on appeal by correcting or supplementing the record before the Appeal Board—the record upon which he must ultimately rely in any attempt to overcome the basis-in-fact barrier to judicial review. *United States* v. *Owen,* 415 F. 2d 383, 389 (8th Cir. 1969). Precisely because it enables a registrant to develop a complete record, "the opportunity for full administrative review", as the Court recently said, "is indispensable to the fair operation of the Selective Service System." *Mulloy* v. *United States,* 398 U.S. 410, 416.[6a]

The right of a registrant to be heard through submission of a written statement in support of his classification

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[6a] Failure to afford a registrant an opportunity to present his case to the Appeal Board renders the appeal record incomplete and fundamentally defective. Since judicial review of the merits of a registrant's classification is confined to the appeal record, it certainly would be unfair for a court to determine the existence of a basis in fact from a record, like the one in this case, which does not contain a complete statement of the registrant's position and supporting evidence. In *Cox* v. *United States,* 332 U.S. 442, 444-445, this Court based its approval of the procedure limiting judicial review of Selective Service classifications to the administrative record, specifically upon its finding that "the board records were made by [the registrants]" and that it "was open to them [the registrants] to furnish full information as to their activities." See also *United State* v. *Owen,* 415 F. 2d 383, 389 (8th Cir. 1969); *United States* v. *Purvis,* 403 F. 2d 555, 560 (2d Cir. 1968); and *infra* at pp. 31-32.

before the Appeal Board renders a final decision will in no way encumber the process of military selection. Indeed, such a submission is consistent with the "over-all procedures set up in the statute and regulations, [which are] designed to be 'fair and just' in their operation. . . ." *Gonzales* v. *United States, supra,* at 417; see also *Simmons* v. *United States,* 348 U.S. 397, 405. Thus, under 32 CFR § 1626.12 a registrant who appeals an unfavorable local board classification is entitled to file a statement with the Appeal Board to rebut adverse findings by the local board. This procedure was held by the Court in *Gonzales* to be "broader than the bare right to correct 'errors' " and to include the right of a registrant to fortify his qualifications for the classification he desires by furnishing the Appeal Board with supplementary information. *Id.* at 417.[7]

A registrant in petitioner's situation has an equal, if not greater, right to be heard in defense of a favorable classification by the local board. Here the State Director's appeal, without specification, requires the Appeal Board to search out a basis for overturning the local board determination; the appeal process therefore takes on all the trappings of an adversarial proceeding. Cf. *In re Gault,* 387 U.S. 1; *In re Ruffalo,* 390 U.S. 544. This situation is compounded by the absence of the independent Justice Department review procedures, which were not retained by Congress in the 1967 Selective Service Act. *United States* v. *Owen, supra* at 389.

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[7] After petitioner's personal references learned of the State Director's appeal, several of them wrote to the Appeal Board on petitioner's behalf. The Appeal Board, while not objecting to the submission of these letters in principle, acted in such a summary and secretive manner on petitioner's case that these letters arrived too late to be included in the record. Treatment of petitioner in this fashion comports with neither the open and deliberative appeal process Congress intended, nor the elementary demands of due process. *United States* v. *Ford,* 431 F. 2d 1310 (1st Cir. 1970); *United States* v. *Bellmer,* 404 F. 2d 132 (3rd Cir. 1968); *Slettehaugh* v. *Tarr,* 322 F. Supp. 180 (D. Minn. 1971).

In *Gonzales*, this Court held that a registrant must be afforded an opportunity to submit a statement to the Appeal Board in response to an adverse recommendation by the Justice Department. Similarly, in this case, as Chief Judge Lumbard concluded, petitioner should have been afforded an opportunity to submit a statement presenting his position on any issue or factual question which the Appeal Board deemed to have been raised by the State Director's appeal.

2. Obviously, timely and adequate notice of the issues and factual questions on appeal is implicit in the registrant's right to be heard. See *Goldberg* v. *Kelly*, *supra* at 267; *In re Gault*, 387 U.S. 1, 33-34 and 73 (Mr. Justice Harlan concurring). There is no ground for dispute on this point, since, as the Court ruled in *Gonzales*, "the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with an awareness of the recommendations and arguments to be countered." *Id.* at 415. See also *In re Ruffalo*, *supra* at 550; *Morgan* v. *United States*, 304 U.S. 1, 18; *Ohio Bell Tel. Co.* v. *Pub. Util. Comm'n*, 301 U.S. 292, 300-305; *United States* v. *Abilene & So. Ry. Co.*, 265 U.S. 274, 389.

It would amount to no hearing at all if a registrant were merely advised that he might submit a statement in support of his conscientious objector status, without any indication to him of what the Appeal Board considered pertinent—indeed, what it considered conclusive unless rebutted.[8] In *Chernekoff* v. *United States*, 219 F.2d 721

[8] Prior to 1967, it might have been argued that a registrant claiming conscientious objector status was adequately notified of the issues on appeal upon receipt, pursuant to this Court's rulings, of a "fair resume" of any adverse evidence unearthed by the FBI investigation and a copy of the Justice Department recommendation to the Appeal Board. But today, in the absence of these procedures, the failure of the Appeal Board to notify a registrant in petitioner's circumstances of the precise issues forces him to "proceed in darkness." *United States* v. *Broyles*, 423 F. 2d 1299, 1305-1306 (4th Cir. 1970) (*en banc*).

(9th Cir. 1955) the court condemned as a violation of due process the failure of an Appeal Board to notify a registrant that it was considering derogatory information contained in his file. Any registrant who attempted to present his case to an Appeal Board in these circumstances would be in the position, as the Ninth Circuit graphically put it, of a "blind man striking at an invisible foe." *Id.* at 723-724.

In closely analogous cases, the failure of a local board to state reasons for an unfavorable classification has been unanimously treated by the courts, which have had occasion to review this procedure, as a denial of procedural due process because such failure prevents a registrant from prosecuting a meaningful administrative appeal. As Judge Weinstein stated in *United States* v. *St. Clair*, 290 F. Supp. 337, 345 (E.D.N.Y. 1968):

> "Where no facts or inferences upon which the Local Board's conclusion is based are stated, effective rebuttal is impossible. No advocate can persuasively assert grounds for reversal when the bases for decision below are unknown." See also *Brown* v. *Resor*, 429 F. 2d 1340, 1343 (10th Cir. 1970.)

So, too, where the State Director appeals a favorable Local Board determination, it is incumbent on the Appeal Board to provide the registrant with specific notice of the issues on appeal. This will not entail any interruption

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Surely, as evidenced by his letters to the Appeal Board and the State Director, petitioner cannot be presumed to have "knowledge" of what they perceived to be the issues. Petitioner has never even had the benefit of the "vague hints" which this Court found insufficient notice in *Simmons*. In *Simmons*, moreover, the Court applied a subjective test: whether, in fact, the registrant had been alerted to the issues. Given the background of this case, particularly the fact that the local board sustained petitioner's claim for conscientious objector status, it cannot seriously be argued that such a test could be met here. Nor can it be argued that petitioner's speculations, if any, as to what the issues might be provide a substitute for constitutionally adequate notice, one of the purposes of which is to "clarify the issues to be considered." *In re Gault, supra* at 34 n. 54.

of the Board's processes. By regulation, 32 CFR § 1626.23, the Appeal Board is required to conduct a preliminary review of each file forwarded to it on appeal, to determine whether the "record is complete" and whether the information in the file is sufficient to enable it to determine the registrant's classification. Certainly, after such review of petitioner's file had been completed, the Appeal Board was fully cognizant of the precise issues, and it would have been only fair to have given petitioner notice at that point of these issues so that he could have submitted a relevant response.

Clearly, under *Gonzales* and *Simmons*, such notice should also have advised petitioner of any statement or recommendations submitted by the State Director to the Appeal Board. Based on these decisions, the court in *United States* v. *Cummins*, 425 F. 2d 646 (8th Cir. 1970) recently upheld a registrant's "right to be notified, upon request, of any statement placed in the registrant's file by the State Director in the process of appealing." *Id.* at 649. See also *United States* v. *Thompson*, 431 F. 2d 1265, 1271 (3rd Cir. 1970); *United States* v. *Owen*, *supra*, at 388-389; *United States* v. *Cabbage*, 430 F. 2d 1037, 1039-1041 (6th Cir. 1970); *Murray* v. *Blatchford*, 307 F. Supp. 1038, 1054-1055 (D.R.I. 1969); *Wiener* v. *Local Bd. No. 4*, 302 F. Supp. 266 (D. Del. 1969); *Nevarez Bengoechea* v. *Micheli*, 295 F. Supp. 257 (D.P.R. 1969).[9]

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[9] When petitioner's case was submitted to the Appeal Board on June 20, 1968 for its consideration, the Board was given a "brief" prepared by one of the Local Board's employees, which apparently contained a "summary of the registrant's Selective Service file." (A. 89h). The respondents assured the courts below that this "brief" did not "contain any information not contained within the file. Although we have never received a copy of this "brief" it is safe to assume that it does not recite verbatim and unselectively the contents of petitioner's file. Clearly, under *Simmons* and *Gonzales*, petitioner should have been given a copy of this "brief" before it was presented to the Appeal Board, so that he could correct any errors or call the Board's attention to material in his file to which the "brief" did not refer.

Similarly, a registrant should receive prior notice of the Appeal Board's intention to take cognizance of information outside the record, such as "general information concerning economic, industrial and social conditions", pursuant to 32 CFR § 1626.24(b). In this case, Chief Judge Lumbard found that there was a serious danger that the Appeal Board had utilized this power and had, in rendering its decision, relied upon "invalid inferences" drawn from the fact that in 1966, while the petitioner was an intern at a Cleveland hospital, he contributed his spare time to a ghetto neighborhood free clinic sponsored by the Students for a Democratic Society (A. 118). No valid concept of administrative notice permits such undisclosed, let alone such unfounded, considerations to influence the decision-making process of any agency. See *Garner* v. *Louisiana*, 368 U.S. 157, 173; *Ohio Bell Tel. Co.* v. *Comm'n*, *supra* at 301-302; *Murray* v. *Blatchford*, *supra* at 1051, 1054-1055.

3. Equally fundamental, as Chief Judge Lumbard concluded, is petitioner's right to a statement of reasons by the Appeal Board for its decision (A. 119).

"The orderly functioning of the process of judicial review requires that the grounds upon which the administrative agency acted be clearly disclosed . . ." *SEC* v. *Chenery Corp.*, 317 U.S. 80, 94. See also *Goldberg* v. *Kelly*, *supra* at 271; *Specht* v. *Patterson*, 386 U.S. 605, 610; *National Geographic Society* v. *District Unemployment Comp. Bd.*, 438 F. 2d 154, 158 (D.C. Cir. 1970); 2 Davis, *Administrative Law* § 16.05. (1970 Supp.). The soundness of this principle is nowhere more apparent than in cases, such as the present one, involving an Appeal Board's unexplained determination to revoke a registrant's conscientious objector status. Since the "ultimate question" in conscientious objector cases is "the sincerity of the registrant", *Witmer* v. *United States*, 348 U.S. 375, 381, "any fact which casts doubt on the veracity of the registrant is relevant", *id.* at 382. In the absence of specific find-

ings, intelligent judicial review on the issue of sincerity is impossible because

> "A court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's prima facie case." *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969).[10]

Because the Appeal Board did not personally examine petitioner, it could not properly reverse the Local Board on the grounds that it did not believe him. But, even the presence of this fundamental error can not be detected by a reviewing court without a statement of reasons by the Appeal Board. See *Witmer* v. *United States, supra* at 382-383; *United States* v. *Abbott, supra* at 914 n. 5; cf. *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196-197.

POINT II

The summary procedures employed by the State Director and State Appeal Board to revoke petitioner's conscientious objector status were not authorized by the Selective Service Act of 1967 and, to the contrary, were in violation of the fair hearing procedures implicitly guaranteed by that statute.

Appeals from local board determinations may be prosecuted under the Selective Service Act of 1967 [50 U.S.C. App. §460(b)(3)] "in accordance with such rules and regulations as the President may prescribe." No spe-

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[10] See also *Witmer* v. *United States, supra* at 381-382; *United States* v. *Lenhard*, 437 F. 2d 936, 937 (2d Cir. 1970); *United States* v. *Abbott, supra* at 913 n. 4; *United States* v. *Broyles*, 423 F. 2d 1299, 1306 (4th Cir. 1970); *United States* v. *St. Clair, supra* at 340-341; *United States* v. *Lamberd*, 315 F. Supp. 1362 (W.D. Mo. 1970); cf. *Brown* v. *Resor, supra; United States ex rel. Morton* v. *McBee*, 310 F. Supp. 328, 331-332 (N.D. Ill. 1970). Since the Appeal Board must state reasons for affirming a local board's denial of conscientious objector status, *a fortiori* it must state reasons for reversing a local board's decision to grant such status.

cific rules and regulations have been prescribed for appeals prosecuted by a State Director from a local board determination that a registrant is entitled to conscientious objector status. The procedures governing these appeals, consist of an unwritten, administrative practice which, as evidenced by this case, denies all semblance of procedural fairness. See also *United States* v. *Cummins, supra; Wiener* v. *Local Bd. No. 4, supra*; *Nevarez Bengoechea* v. *Micheli, supra.*

This Court has firmly declared its unwillingness to assume that delegation to an agency of a general power to prescribe rules and regulations is statutory authorization for it to adopt summary procedures.[11] The strength of the Court's resolve on this point was demonstrated in *Greene* v. *McElroy*, 360 U.S. 474, which involved the sensitive area of the Defense Department's industrial security clearance program. Cf. *Schneider* v. *Smith*, 390 U.S. 17.

The course of action followed in *Greene* was grounded on the constitutional principle, controlling in this case as well, that "where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." 360 U.S. at 496. While agreeing with the Government that security clearance programs were authorized by the Congress and

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[11] Similarly in *Breen* v. *Selective Service Local Board*, 396 U.S. 460, the Court "rejected for several reasons" the Second Circuit's determination "that the reference in § 6(h)(1) to 'such rules and regulations as [the President] may prescribe' was an indication that Congress authorized revocation of student deferments for violations of the delinquency regulations." 396 U.S. at 464. Among those reasons was one referred to in *Gutknecht* v. *United States*, 396 U.S. 295, namely the necessity for reading such authorizations strictly to avoid serious constitutional questions relating to the sufficiency of statutory standards and the validity of the delinquency regulations on their face and as applied.

the President, operating through their respective constitutional powers, the Court found that neither the statutes nor executive orders relied upon by the Government contained specific instructions that individuals should be denied employment opportunities "in a manner which is in conflict with our long-accepted notions of fair procedures." *Id.* at 506-507. Only the "most explicit action by the Nation's lawmakers", the Court concluded, would warrant a finding that summary procedures were at least properly authorized, if not constitutionally fair. The Court ruled that such "explicit action" is required by the Constitution "not only to assure that individuals are not deprived of cherished rights" but also to prevent "decisions of great constitutional import and effect [from being] relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Id.* at 507.

The authorization contained in 50 U.S.C. App. § 460(b)(3) is no more explicit authority in this case for denying notice, an opportunity to be heard and statement of reasons than were the similarly broad delegations of power considered and found wanting in *Greene*. Furthermore, the assumption that summary procedures are authorized by statute is nowhere less acceptable than in this case, where there exists a "strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors . . ." *United States* v. *Gearey*, 368 F. 2d 144, 150 (2d Cir. 1966) *cert. denied*, 389 U.S. 959; *Blalock* v. *United States*, 247 F. 2d 615, 619 (4th Cir. 1957).

Moreover, based on this policy the Court has treated Congressional silence regarding applicable procedures in the Selective Service appellate process as not merely insufficient authorization for summary procedures, but as affirmative support for construing the Act in accordance with "underlying concepts of procedural regularity and

basic fair play." *Gonzales* v. *United States*, *supra*, at 412. This was the approach adopted in both *Simmons* and *Gonzales* which involved the procedures for Department of Justice investigation, hearing and recommendation in connection with Appeal Board consideration of conscientious objector appeals, 50 U.S.C. App. § 456(j) (1951).

Simmons held that registrants are entitled to receive a "fair resume" of any adverse evidence disclosed by the FBI investigation prior to the Department of Justice hearing. Furnishing the registrant with such a resume, the Court found, would enable him adequately to prepare and present his defense against the adverse evidence at the hearing. Because the duty to provide timely notice in the form of a "fair resume" was fully in accord "with the statutory plan and the concepts of basic fairness which underlie all our legislation" the Court found it unnecessary to decide the issue on constitutional grounds. *Id.* at 405.

Similarly, in *Gonzales*, the Court declared that since a registrant may present a statement to the Appeal Board, he had an implicit right to present an effective statement, and therefore "was entitled to know the thrust of the [Justice] Department's recommendation so that he could muster his facts and arguments to meet its contentions." 348 U.S. at 414.

While the Department of Justice procedure involved in *Simmons* and *Gonzales* was abandoned by Congress in the 1967 Act in order to streamline the appellate process, there was no intention to eliminate the basic protections afforded registrants claiming conscientious objector status. See H.R. Rep. No. 267, 90th Cong., 1st Sess. (1967), 1 U.S. Code Cong. & Adm. News 1348 (1967); *United States* v. *Lamberd*, 315 F. Supp. 1362, 1370 n. 5 (W.D. Mo. 1970).

Also, the fact that "full administrative review" remains so vital to the overall fairness of the System's

operation removes any basis for assuming that Congress has altered its determination that the appellate process itself be governed by fair and equitable procedures. Therefore, it cannot be doubted that registrants continue to be entitled to "a meaningful, thoughtful review and consideration by the Appeal Board which Congress set up for just such purpose." *Slettehaugh* v. *Tarr*, 322 F. Supp. 180, 184 (D. Minn. 1971). A "meaningful, thoughtful review" was precisely what petitioner was denied by the summary procedures employed in this case.

Unless we assume, which we do not, that *Simmons* and *Gonzales* were decided on the basis of form and not substance, it must be concluded that under those decisions petitioner and other similarly situated registrants are entitled by statute to notice of the alleged defects in their cases, any adverse recommendations by State Directors or others, and any facts of which the Appeal Boards propose to take administrative notice; to an opportunity to present their defense, through effective written statements to their Appeal Boards; and to a fair statement of reasons, so that if they choose, they may obtain meaningful, judicial review. See *United States* v. *Cummins, supra; Wiener* v. *Local Bd. No. 4, supra; Murray* v. *Blatchford, supra.* No other conclusion is possible if the Selective Service appellate process is not "to be conducted on the level of a game of blind man's buff." 348 U.S. at 405.

POINT III

There is no statutory authority for an Appeal by the State Director to the Appeal Board from a Local Board's determination that a registrant is entitled to conscientious objector status.

The Selective Service Act of 1967 provides that all determinations of a Local Board with respect to the granting or denial of exemptions or deferments are "final" except where an appeal is authorized. . . ." 50 U.S.C. App. § 460(b)(3). But the Act does not contain any specific authorization for such appeals, whether by registrants or State Directors.

Prior to 1967, the only specific statutory authorization for an administrative appeal involving a conscientious objector claim was that for an appeal by a registrant "if such claim was not sustained by the Local Board." 50 U.S.C. App. § 456(j) (1951). This provision was deleted from the 1967 Act, together with the provision for an independent Department of Justice review where such an appeal was taken.

Clearly, Congress did not intend, by its silence in the 1967 Act, to eliminate the long standing administrative practice of allowing registrants to appeal local board denials of conscientious objector claims. But nothing in this silence and lack of specific authorization should be read as Congressional approval for an unprecedented grant to a State Director of the power to appeal a local board's determination that a registrant is entitled to conscientious objector status.

There is no more appropriate case than this one in which to apply this Court's ruling that it "will construe narrowly all delegated powers that curtail or dilute" a citizen's liberties. *Kent* v. *Dulles*, 357 U.S. 116, 129; see

also *Gutknecht* v. *United States*, 396 U.S. 295; *Schneider* v. *Smith*, 390 U.S. 17. This rule of strict construction was applied in *Peters* v. *Hobby*, 349 U.S. 331 to sustain an individual's interest in finality in the administrative process. In *Peters*, the Court rejected the Government's contention that implied authorization was sufficient basis for the Civil Service Commission's Loyalty Review Board to appeal, on its own motion, an HEW loyalty board's determination that an employee was not subject to dismissal for disloyalty. The Court read the Commission's authority narrowly because the power claimed by the Commission, if sustained, would have devastating consequences for the individuals involved. Mr. Chief Justice Warren, writing for the majority, analogized the limitation of the Commission's power to appeal to that of the Government's after a verdict of acquittal has been rendered in a criminal proceeding. *Id.* at 344-345. Such a limitation was an important safeguard for the employee, because it left the initial determination of his loyalty "to his co-workers in the department—to his peers, as it were—who knew most about his character, his actions and his duties." *Id.* at 345.

A registrant's Local Board occupies a similar position in the Selective Service System. The members of the Board must, whenever possible, live within the Board's jurisdiction. They are the only representatives of the system who have close and constant contact with the registrant and will, as in this case, have the sole responsibility of personally examining a registrant's qualifications for conscientious objector status. Once the Local Board has sustained this claim, its decision should be as final as a verdict of acquittal.[12]

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[12] This does not mean that the State Director cannot request a Local Board to reopen its classification upon a showing of new evidence, or that the Board misapplied or misapprehended the law or that the registrant obtained his classification by fraud. Certainly, this would be consistent with the over-all statutory scheme, since it would permit the registrant to appear personally before the Local Board, if necessary, in response to the State Director's charges.

Assuming, *arguendo*, that there is in fact statutory authorization for the State Director's appeal from a Local Board determination that a registrant is entitled to conscientious objector status, that authorization should be construed narrowly so as to limit appeals solely to situations where the State Director specifically alleges that the Local Board departed from governing legal standards. The Appeal Board does not conduct personal interviews or hold any hearings and consequently it should be bound by and no appeal should lie from the Local Board's determination of factual issues.

POINT IV

Revocation of petitioner's conscientious objector status by fundamentally unfair and statutorily unauthorized procedures constitutes "blatantly lawless action", which § 10(b)(3) does not insulate from pre-induction judicial review.

Section 10(b)(3) declares that a decision of an Appeal Board shall be "final" and that

> "[n]o judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards or the President, except as a defense to a criminal prosecution . . . after a registrant has responded either affirmatively or negatively to an order to report for induction . . . Provided that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Literal reading of this provision is impermissible, as this Court recently made clear in *Oestereich* v. *Selective Service Local Board*, 393 U.S. 233 and *Breen* v. *Selective Service Local Board*, 396 U.S. 460. There is, for example, no doubt that § 10(b)(3), despite its specific language, does not bar registrants from resorting to post-induction

habeas corpus to challenge the validity of their classifications. 393 U.S. at 238.

Similarly, *Oestereich* and *Breen* recognize the plain injustice and possible unconstitutionality of § 10(b)(3) if it were read to require literal obedience in all cases to its ban against pre-induction judicial review. Consequently, in those cases, the Court held that where a registrant's induction order is the product of statutorily unauthorized procedures, § 10(b)(3) would not be construed to require him to submit to induction or undergo criminal prosecution to test the order's validity.

There is no more reason in this case than there was in *Oestereich* and *Breen* for reading § 10(b)(3) "with unnecessary harshness" (393 U.S. at 238), or in such a way as to "raise serious constitutional problems." (393 U.S. at 243, Mr. Justice Harlan concurring). Petitioner should not be compelled to relinquish his religious convictions by submitting to military authority or risk his liberty in a criminal prosecution in order to obtain judicial redress for deprivations of constitutionally and statutorily guaranteed procedural rights. In addition, literal application of § 10(b)(3) in this case, as in *Oestereich* and *Breen* conflicts with another express provision of the Act, namely § 6(j) in which Congress has declared that "nothing" in the Act "shall be construed to require a person to be subject to combatant training and service . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. § 456(j).

Practical considerations as well militate against a literal application of § 10(b)(3) in this case. To defer consideration of petitioner's procedural challenge, until it is raised, in all probability,[18] as a defense to a criminal

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[18] The alternative route of a post-induction writ of habeas corpus is unavailable to petitioner, who cannot, consistent with his conscientious objection, enter military service. This has been generally true of most conscientious objectors. See *United States* v. *Freeman*, 388 F. 2d 246, 248-249 (7th Cir. 1967).

prosecution, serves the interests of neither administrative efficiency nor judicial economy and is a result that one can hardly assume Congress intended.

Whatever may be the differences between the position of the majority and that of Mr. Justice Harlan in *Oestereich* and *Breen* with respect to the precise metes and bounds of § 10(b)(3), those differences are not applicable here. This case falls well within the area where both positions overlap, since, as Chief Judge Lumbard concluded, "the claim of Board 'lawlessness' Fein raises . . . [is] substantially similar to the situations in *Oesteriech* and *Breen*." (A. 106).

Both *Oestereich* and *Breen* involved a pre-induction challenge to the delinquency regulations (32 CFR § 1642.12) pursuant to which registrants were reclassified I-A from exempt or deferred status on the basis of their having surrendered possession of their draft cards as an expression of protest against the Vietnam war. In each case, it was claimed that the delinquency regulations were (i) facially unconstitutional, (ii) unauthorized by statute, (iii) in conflict with other statutory provisions, and (iv) unconstitutionally applied to penalize lawful protest. Regarding the first claim, the Court noted that serious constitutional questions were presented by the absence of sufficient standards in the delinquency regulations, but did not decide the issue because it found that the use of those regulations to reclassify registrants constituted "a clear departure by the Board from its statutory mandate." *Oestereich* v. *Selective Service Board, supra,* at 238; *Breen* v. *Selective Service Board, supra,* at 467.

On the question of § 10(b)(3), the Court held that where the validity of an induction order is challenged on the grounds that the Board has exceeded its constitutional or statutory authority and, in other words, has engaged in "blatantly lawless" conduct, pre-induction review is not precluded.

Petitioner raises precisely the same claims with respect to the summary revocation of his conscientious objector status. Nevertheless, the majority below sought to distinguish *Oestereich* and *Breen* from the present case and invoked § 10(b)(3) as a bar to pre-induction judicial review. In their opinion *Oestereich* and *Breen* apply only to cases where a registrant claims the loss of an exempt or deferred status as to which he has a "clear statutory right." (A. 101).

Nothing in *Oestereich* and *Breen* or for that matter any other decision of this Court lends support to the majority's conclusion. However, even assuming that this severely restrictive reading of *Oestereich* and *Breen* is correct, petitioner's challenge to the summary procedures employed by the Appeal Board would not be barred by § 10(b)(3).

Local Boards are empowered to "hear and determine" all claims for exemption and deferment. 50 U.S.C. App. § 460(b)(3). Classification as a conscientious objector is expressly conditioned, by statute, on the registrant's claim being "sustained by the local board". 50 U.S.C. App. § 456(j). And this determination of the Local Board is "final" unless "an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. § 460(b)(3). Therefore, following the Local Board's determination, petitioner was vested with a "clear statutory right" to his conscientious objector classification, subject to revocation, as were the classifications in *Oestereich* and *Breen*, only in accordance with statutorily authorized and constitutionally valid procedures. In this case, as we have demonstrated, the revocation of petitioner's conscientious objector status was accomplished by summary procedures which were not authorized by statute and which, in fact, deprived petitioner of his right to a "meaningful and thoughtful review and consideration by the Appeal Board"—a right implicitly man-

dated by the Selective Service Act. *Mulloy* v. *United States, supra* at 416; *Slettehaugh* v. *Tarr, supra*. The summary procedures were also clearly in violation of the Due Process Clause of the Fifth Amendment.

It is clear, however, that the limitation placed on § 10(b)(3) in *Oestereich* and *Breen* is not confined to a single category of "blatantly lawless" conduct or to the particular factual situations involved. Rather, these decisions are expressly founded upon a fundamental and comprehensive distinction between the Board's "normal operations" involving the presumptively valid exercise of discretion or application of expertise, which are not subject to pre-induction review, and those involving a "clear departure by the Board from its statutory mandate." *Oestereich* v. *Selective Service Board, supra* at 238; *Breen* v. *Selective Service Board, supra,* at 467. In the latter category, which obviously also includes a Board's use of procedures which, on their face, are contrary to a constitutional mandate (*Oestereich* v. *Selective Service Board, supra*), pre-induction judicial review is available.

The holdings in *Oestereich* and *Breen,* therefore, unquestionably support pre-induction review of petitioner's claims since, in each case, as Chief Judge Lumbard found:

> "the registrant challenges a procedure unauthorized by statute while claiming that the regulation deprives him of a right based on higher authority . . . [I]n *Oestereich,* the conflict posed was between a board regulation—the delinquency provision—and a statutory command, the ministerial exemption. Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for prejudicial review," (A. 14).[14]

[14] Chief Judge Lumbard's conclusion is in accord with the rulings of a substantial majority of the lower courts which have considered this question. Indeed, some of these Courts have assumed pre-induction jurisdiction to review claims like petitioner's, involving a denial of procedurally fair consideration by an Appeal Board. See

Allowing pre-induction judicial review in this case is consistent with the basic purpose of § 10(b)(3), which is to limit judicial review in time as well as scope in order to ensure that Local and Appeal Boards will be free to exercise their discretion and expertise without the threat of "litigious interruption". *Clark* v. *Gabriel*, 393 U.S. 256, 258; *National Student Assoc.* v. *Hershey*, 412 F. 2d 1103, 1109 n. 17 (D.C. Cir. 1969); cf. *McKart* v. *United States*, 395 U.S. 185. Thus, where these boards have proceeded in a fair and regular manner, § 10(b)(3) invests their classification and processing decisions with presumptive validity, reviewable only after the registrant has submitted to or refused induction and then only as to whether the classification is entirely unsupported by any evidence.

As Mr. Justice Harlan makes clear, "these factors are significantly altered where the registrant contends that the procedure employed by the Board is invalid on its face." 393 U.S. at 241.

"In neither *Oestereich*, *Breen*, nor this case", as Chief Judge Lumbard concluded, "are there any discretionary determinations of the system involved, nor are there any factual inquiries required." (A. 108). These cases contrast with the situation involved in *Gabriel*, where

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Wiener v. *Local Bd. No. 4*, *supra*; *Murray* v. *Blatchford*, *supra*; *Slettenhaugh* v. *Tarr*, *supra*. Similarly, courts have afforded registrants pre-induction review where other basic procedural errors deprived them of their right to a full administrative review. See *Hunt* v. *Local Board No. 197*, — F. 2d — (3rd Cir. decided February 5, 1971); *Swift* v. *Selective Service Dir.*, — F. 2d — (D.C. Cir. 1971), 39 U.S. Law Week 2561; *Fallon* v. *Selective Service*, 321 F. Supp. 988 (W.D. Wis. 1971). In other cases, courts have reviewed claims that a Board failed to follow statutory requirements even though the registrant was merely seeking, and did not already possess, a deferred or exempt status. *Bowen* v. *Hershey*, 410 F. 2d 962, 963-964 (1st Cir. 1969); *Wright* v. *Selective Service Bd.*, 319 F. Supp. 509 (D. Minn. 1970). See generally, Donahue, *The Supreme Court vs. Section 10(b)(3)*, 17 U.C.L.A. L. Rev. 908 (1970).

§ 10(b)(3) was held to apply. There, no question was raised about the Board's statutory and constitutional authority to exercise its discretion in passing on a particular request for classification. Rather, the sole question was whether the evidence supported denial of Gabriel's requested classification. This undeniably called for judicial review of "a determination of fact and an exercise of judgment." 393 U.S. at 258.[15]

Unlike *Gabriel*, there is no danger of "litigious interruption" here. Resolution of petitioner's claims of procedural unfairness does not require the court to engage in a time consuming and laborious analysis of the evidence in the record supporting or detracting from his right to conscientious objector status. Petitioner's case is purely a legal one, easily resolved by reference to *Simmons*, *Gonzales*, *Greene* and a few, more general decisions by this Court on the subject of procedural due process.[16]

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[15] Gabriel's principal claim was that his 1-A classification was not supported by a basis in fact. He apparently did raise two additional contentions, that the Board misapplied the statutory standard for conscientious objector status and was motivated by hostility toward registrants who claim such status. 393 U.S. at 256. Contrary to the view of the majority below, these additional claims could not "have been passed on without inquiry into findings of fact or exercise of discretion by the local board." (A. 110, n. 4). Except in the rare case, bias or misapplication of statutory standards must be inferred from conflicting and ambiguous evidence in the administrative record. A trial to resolve factual controversies would in all probability be required. See *Donahue*, *supra* at 925; compare *National Student Assoc.* v. *Hershey*, *supra*.

It should also be noted that the additional claims in *Gabriel* do not appear to have been presented to, or considered by the district court, and therefore were not properly before this Court. See *Gabriel* v. *Clark*, 287 F. Supp. 369 (N.D. Cal. 1968).

[16] The majority below relies heavily on the summary affirmance of *Boyd* v. *Clark*, 393 U.S. 316. While it is difficult to determine precisely what was meant by the cryptic reference to *Gabriel* in *Boyd*, it is clear that the registrants in both cases claimed that their Boards

In fact, contrary to the implication in the majority opinion below (A. 97), petitioner's procedural challenge in no way calls upon a court to review the discretionary judgment of the Appeal Board as to whether it is or is not supported by a basis in fact in the record. It would be constitutionally improper and against petitioner's best interests for a court to determine that issue based on the record as it presently exists, even if this issue was raised after petitioner had refused induction. Because petitioner was denied an opportunity to present his position on the issues before the Appeal Board, the record in this case is intrinsically deficient and cannot lawfully be the basis for a final determination of petitioner's classification. As a practical matter, while petitioner cannot conceive of any legitimate basis in the present record supporting the Appeal Board's action, it certainly would be foolhardy of him not to take advantage of his procedural rights to present his side of the case to the Appeal Board and to make

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applied certain statutes or regulations discriminatorily against them. Unlike *Oestereich, Breen* and this case, *Boyd* and *Gabriel* did not raise any challenge "to the validity of the laws themselves." 393 U.S. at 244-245, n. 7 (Mr. Justice Harlan concurring). Resolution of the claims made in *Boyd* and *Gabriel* inevitably would involve difficult factual issues and therefore certainly would result in the "litigious interruption" that section 10(b)(3) was designed to avoid.

In *McKart* v. *United States, supra,* the Court referred to *Oestereich* as "a case where all administrative appeals had been exhausted." *Id.* at 199 n. 18. By contrast, the registrants in *Boyd* had not exhausted their administrative remedies, they had not been ordered for induction, and, as Chief Judge Lumbard found, they "had not reached a position of finality within the system." (A). *Boyd* therefore represents an application of the exhaustion requirements enunciated in *Estep* v. *United States,* 327 U.S. 114, 123 and *Falbo* v. *United States,* 320 U.S. 549 and embodied in § 10(b)(3). These requirements bar registrants from prematurely resorting to the courts to enjoin their induction (*McKart* v. *United States, supra* at 197), not from seeking, like petitioner, redress for deprivation of constitutional or statutory rights where there is no administrative remedy available "which might have cured or rendered moot the very defect . . . complained of in court." *McGee* v. *United States, supra,* 39 U.S. Law Week at 4572.

a complete appellate record in support of his conscientious objector status before submitting his claim to a court for final determination. See *Cox* v. *United States, supra.*

In these circumstances, where it has been found that a registrant was improperly denied his right to meet the issues at the administrative appeal level, judicial review has been assiduously restricted to the purely legal questions of procedural fairness. For example, in both *Simmons* and *Gonzales,* the briefs for the petitioners and respondents were concerned primarily with the basis in fact issue,[17] but, in both cases, the Court reached and decided only the remedial issue of procedural fairness. That the procedural question is genuinely distinct from the fact issues is clearly evidenced by the Court's rejection of the Government's harmless error contention in *Simmons*:

> "Petitioner has been deprived of a fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." 348 U.S. at 406.[18]

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[17] See e.g., *Gonzales* v. *United States,* Petition for a Writ of Certiorari, pp. 2, 22; Government's Brief in Opposition, pp. 12-15; Petitioner's Brief, pp. 27-41; Government's Brief, pp. 15-27; *United States* v. *Simmons,* Petition for a Writ of Certiorari, pp. 2, 13-14; Government's Brief in Opposition, pp. 11-14; Petitioner's Brief, pp. 7, 26-40; Government's Brief, pp. 17-31.

[18] See also *Morgan* v. *United States, supra* at 22. Lower courts faced with an Appeal Board's failure to afford a registrant an opportunity to submit his side of the case on appeal have, similarly, refused to decide the merits of the registrant's classification claim on such a one-sided record and have remanded the case to the Appeal Board with directions that it permit the registrant to file a responsive statement to complete the record. See *United States* v. *Cabbage, supra* at 1042; *Wiener* v. *Local Bd. No. 4, supra*; *Nevarez Bengoechea* v. *Micheli, supra* at 260; *United States* v. *Lamberd, supra*; *Slettehaugh* v. *Tarr, supra* at 184.

Finally, as Mr. Justice Harlan concluded, "a challenge to the administrative procedure itself not only renders irrelevant the presumption of regularity, but also presents an issue beyond the competence of the Selective Service Boards to hear and determine." 393 U.S. at 242. On the last point, it is particularly important to note that petitioner's challenge, even more so than the questions concerning the delinquency regulations presented in *Oestereich* and *Breen*, goes to the heart of the presumptive validity surrounding the Board's "classification and processing" decisions. The failure to give petitioner notice, an opportunity to respond to the issues and a statement of reasons renders the Board's decision inherently unreliable and fundamentally defective. Judicial relief in advance of completion of the administrative process has always been available, as Mr. Chief Justice Burger (then a member of the Court of Appeals for the District of Columbia) ruled "where on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds." *Wolf Corporation* v. *SEC*, 317 F. 2d 139, 143 (D.C. Cir. 1963); see also *Amos Treat & Co.* v. *SEC*, 306 F. 2d 260, 266-267 (D.C. Cir. 1962); *Consolidated Edison Co.* v. *McLeod*, 302 F. 2d 354, 355 (2d Cir. 1962); *Sinclair Oil Corp.* v. *Smith*, 293 F. Supp. 1111, 1115 (S.D.N.Y. 1968); and generally, Jaffe, *Judicial Control of Administrative Action*, 440-446 (1965); cf. *Leedom* v. *Kyne*, 358 U.S. 184.

POINT V

The $10,000 jurisdictional amount requirement cannot prevent assumption of jurisdiction where fundamental rights are at issue.

This Court has in recent terms on several occasions entertained the question whether the $10,000 jurisdictional amount requirement contained in 28 U.S.C. § 1331(a) is applicable in cases where fundamental federally cognizable

rights are present. Research fails to disclose that Court has squarely reached the issue.

In some instances neither this Court nor lower federal courts attempted to determine the presence of a jurisdictional amount. In *Aptheker* v. *Secretary of State*, 378 U.S. 500, where the right to passport issuance was presented and in *Schneider* v. *Rusk*, 377 U.S. 163 where the right to citizenship was at issue, this Court did not inquire whether the jurisdictional amount was satisfied. Federal courts of appeal have similarly overlooked the question in cases of constitutional dimension, *e.g.*, *Quaker Action Group* v. *Hickel*, 421 F. 2d 1111 (D.C. Cir. 1969) (injunction against picketing); *Thompson* v. *Clifford*, 408 F. 2d 154 (D.C. Cir. 1968) (right of deceased Communist veteran to burial in a military cemetery). In those cases where pre-induction review has been sought federal judges have taken a variety of positions, suggesting finally, substantial confusion over the applicability of the $10,000 amount in controversy requirement. *Wolff* v. *Selective Service*, 372 F. 2d 817, 826 (2d Cir. 1967); *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968) (Dissenting opinion of Judge Edelstein), *aff'd on other grounds*, 393 U.S. 316; *Murray* v. *Vaughn*, 300 F. Supp. 688 (D.R.I. 1969); *Berk* v. *Laird*, 429 F. 2d 302 (2d Cir. 1968); *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D.R.I. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969).

Resolution of the issue must come in the context of the reasonable interests of the federal system and the nature of the right asserted by litigants. Petitioner acknowledges, in an era when the federal courts have increasingly become the forum for redress of constitutional grievances, that there should not be intrusion by federal courts beyond the "rightful independence of state governments", by adjudicating controversies that should be determined by state courts. *Healy* v. *Ratta*, 292 U.S. 263, 269-70. Petitioner similarly acknowledges that "petty"

cases, i.e., those in which nominal property rights as opposed to those of life and liberty are in dispute, are not appropriate to federal jurisdiction. *Giancana* v. *Johnson*, 335 F. 2d 366, 368-369 fn. 7 (7th Cir. 1964); S. Rep. No. 1830, 85 Cong., 2d Sess. 1958, 1958 U.S. Code, Cong. & Adm. News, pp. 3099-3101. Neither of these interests of federalism are presented by petitioner, nor are they relevant in any case in which a Selective Service registrant or in-service military personnel seek to use the federal courts as a forum to consider violations of fundamental fairness.

The alternative to federal court jurisdiction in cases such as petitioner's are stark. Either the courts of fifty states would (if, indeed, they have jurisdiction themselves) be called upon to "adjudicate claims involving the most delicate question[s] of federal constitutional law", *Cortright* v. *Resor*, — F. Supp. — 70 Civ. 909 (E.D.N.Y. 1971), or substantive rights, in the absence of a "forum and procedure for [their] vindication", *supra*, — could not be remedied, creating a constitutional problem of overwhelming proportion. Neither alternative is acceptable.

There is serious doubt that state courts have power to grant injunctive relief against federal officials. See *Armand Schmoll, Inc.* v. *Federal Reserve Bank*, 286 N.Y. 503, 37 N.E. 2d 225 (1941) *cert. denied*, 315 U.S. 818; *Wasservogel* v. *Meyerowitz*, 300 N.Y. 125, 89 N.Y. 2d 712 (1949); Arnold, *The Power of State Courts to Enjoin Federal Officials*, 73 Yale L. J. 1385 (1964); Comment, *Draft Reclassification for Political Demonstrations—Jurisdictional Amounts in Suits Against Federal Officers*, 53 Cornell L. Rev. 916 (1968). Assuming however, state court jurisdiction was present, respondent would have the power to remove to the federal courts, 28 U.S.C. 1442(a). That such an alternative would be exercised appears such a certainty as not to warrant argument. If, however, respondents chose not to remove the cause, then "whatever

mischief is to be expected from interference by federal courts in military matters would be many times compounded by litigations in fifty state court systems", *Cortright* v. *Resor*, *supra*, p. 36.

The government has argued that "Congress has conditioned access to the federal courts on a litigant's ability to establish that his dispute involved a minimum monetary amount and [that] the federal courts may not ignore this requirement even though it may necessitate rejection by them of civil cases that otherwise bring into question significant federal rights." Government's Brief in Opposition to Petition for Certiorari, *Fein* v. *Selective Service*, No. 1129 October Term 1970, p. 7. If the government is correct in this assertion, then federal courts, which have been granted jurisdiction pursuant to 28 U.S.C. §§ 1343-1983 over state action and state officials regardless of the amount in controversy, *e.g.*, *Eisen* v. *Eastman*, 421 F. 2d 560-564 (2d Cir. 1969), would not have jurisdiction over their own officials. On the other hand they would of necessity (unless they argue that there is neither a state nor a federal forum available although a "significant federal right" is present) say that state courts have jurisdiction over federal officials. It is not possible that the federal statutory scheme, and particularly 28 U.S.C. §§ 1337, 1339, 1340, 1343, 1344, 1346, 45 U.S.C. § 51 *et seq.*, 46, U.S.C. 688, be read consistently with such a singular and anomalous result, particularly where federal constitutional rights are present.

The more compelling and enduring question presented by petitioner and not reached by the court in *Boyd* v. *Clark*, 287 F. Supp. 561, 567-69 (S.D.N.Y. 1968) *cert. denied* 393 U.S. 316, is whether a 19th century notion of property rights can be exalted over fundamental issues of life and liberty by depriving a litigant who has been processed in the manner petitioner has by a federal administrative

agency, of a federal forum. Judge Edelstein has put the question in its baldest perspective:

> "If a man can sue in federal court on the allegation that the government is injuring his property, he certainly must be allowed to sue on the allegation that the government is oppressing him personally. Although it might be said human rights are incapable of valuation and hence valueless, it is better to view them as incapable of valuation but only because they are of infinite value. The latter view is, in my humble opinion, the only view compatible with the commitment of our nation to a belief in the dignity of man and the inherent worth of a free individual in a free society."[19] *Id.* at 568.

In simple, a monetary price cannot be placed on constitutionally guaranteed rights because they are of infinite value and concern and do not conform to the property notion of valuation in monetary amount. *Cortright* v. *Resor, supra; Murray* v. *Vaughn, supra; Berk* v. *Laird, supra; Moylan* v. *Laird, supra; Walsh* v. *Local Board No. 10, supra; Faulkner* v. *Clifford,* 289 F. Supp. 895, 899-901 (E.D.N.Y. 1962); Hart & Wechsler, *The Federal Courts and the Federal System,* 312; ALI, *Study of the Division of Jurisdiction Between State and Federal Courts,* 24, 172-76 (1969); Wright, *Law of Federal Courts,* 108-110 (2d ed. 1970); Friedenthal, *New Limitations on Federal Jurisdiction,* 11 Stan. L. Rev. 213, 216-218 (1959);

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[19] Chief Judge Lumbard, dissenting below, although not finding it necessary to reach the question because of the clear ability of petitioner to sustain his allegation of jurisdictional amount found that he:

> ". . . need not consider the case of a poor man who stands to lose nothing but his most precious personal liberties if the unconstitutional actions of the federal government are beyond the reach of the courts. But if that case ever comes before us, I have grave doubts that the old rule requiring the claimed deprivation be capable of monetary valuation would long endure." (A. 113)

Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216, 225-26 (1948); Note, *Draft Reclassification for Political Demonstrations—Jurisdictional Amount in Suits Against Federal Officers*, 53 Cornell L. Rev. 916 (1968).

In any event, this cause cannot be dismissed for lack of jurisdiction since petitioner acknowledgedly can sustain his jurisdictional allegation, *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288. It could however, be remanded, consistent with the actions of this Court in *Oestereich, supra.* An examination of the aftermath of this Court's decision in *Oestereich* in this connection is instructive. Following this Court's remand to the District Court for examination of the *bona fides* of Oestereich's jurisdictional allegations, the government did not canvass to determine whether the amount could be met but rather stipulated both to a discontinuance of the action and restoration of Oestereich's exempt classification. While it is clear there may have been other considerations unrelated to jurisdiction which led to this decision by the government, it is symptomatic of the low and casual regard with which the $10,000 amount requirement is viewed. It has become a tool unevenly applied in selective situations to deny access to a forum for adjudication of rights where a vigorous federalism commands government supporting vindication of those rights.

CONCLUSION

For the reasons stated above, the judgment below should be reversed with instructions to the Court of Appeals that it direct the District Court to enter an order restoring petitioner to his conscientious objector status pending compliance by the Selective Service Appeal Board with the requirements of procedural due process.

Respectfully submitted,

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Appendix

Military Selective Service Act of 1967

§ 10(b)(3) 50 U.S.C. App. § 460(b)(3)

No judicial review shall be made of the classification or processing of any registrant by a Local Board, Appeal Board, or the Presidential Appeal Board except as a defense to a criminal prosecution. . . .

28 U.S.C. § 1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Selective Service Regulations

32 CFR

1626.1 *Appeal by Director and State Director.*—Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board at any time.

1626.11 *How Appeal to Appeal Board is Taken.*—(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

1626.12 *Statement of Person Appealing.*—The person appealing may attach to his appeal a statement specifying

the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

1626.24 *Review by Appeal Board.*

• • •

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

1627.1 *Who May Appeal to the President From Any Determination of an Appeal Board.*—(a) When either the State Directors of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.

1627.3 *Appeal to President.*—When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant, any person who claims to be a dependent of the registrant, or any persons who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant may appeal to the President within 30 days after the mailing by the local board of the Notice of Classification (SSS Form 110) noti-

fying the registrant of this classification by the appeal board. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 30-day period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 30-day period was due to lack of understanding of the right to appeal or to some other cause beyond the control of such person.

Portion of Affidavit of Petitioner Read in Support of Motion for Injunction and Declaratory Judgment.

"(a) War in any form violates the fundamental religious and moral precept that man must live in his community always conscious of the individual value of each human being and that, in addition, war curbs and extinguishes rather than expands man's potential for functioning and good.

"(b) In the code of human relations all religions find their common ground and the substance of my beliefs stems from the common foundations of all religions. The value of theology in this regard is of particular importance in distinguishing the credal differences between religions.

"(c) The sources which shaped my beliefs and have molded my training were my parents, from whom I gained the basis spiritual approach to life, the Lutheran Church, from which I grasped the concepts of equality of man before God and the singular value of each individual human being to God, the civil rights movement, which was my first experience in non-violent principles and tactics in effecting social change, and from the practice of medicine which served in large measure as an extension of the practical training which began in the civil rights movement. In medicine I found a vocational way of expressing my spiritual and moral values and it is has presented me with a new training ground for the practice of my beliefs.

"(d) There was no circumstance in which I could envisage participation in society's use of force for any reason with the limitation that, while I do not know how I would react if violently attacked myself, it is conceivable that my response might be to disarm an opponent. This individual limitation relates merely to a unique situation which I have never in fact encountered and is not generalizable to nation-states and war." (16a-17a)